

For Official Use Only – Pre-decisional Deliberative Information – Not for Public Release

ROLL OUT PLAN

Release of Federal Register Notice (FRN) Announcing NOAA and EPA's Intent to Disapprove Oregon's Coastal Nonpoint Program

Action: Release of Federal Register Notice (FRN) Announcing NOAA and EPA's Intent to Disapprove Oregon's Coastal Nonpoint Program.

Date: The target date for submitting the FRN to the Office of the Federal Register for publication is Dec. 17, 2013. It will likely be published in the Federal Register 3-4 business days later (Friday Dec. 20 if there are no issues once it is submitted).

Roll out lead:

Allison Castellan, NOS/OCRM, (301) 563-1125 (NOAA/NOS lead for action)

Don Waye, EPA/OWOW (202) 566-1170

Jayne Carlin (tentative), EPA R10/OWW (206) 553-8512

NOAA Roll out team:

- National Ocean Service:
 - Allison Castellan, NOS/OCRM (301) 563-1125 (lead for action)
 - Joelle Gore, NOS/OCRM (301) 563-1177
 - Lindsey C. Williams, NOS Policy/Leg 301-713-3070 x 115
- National Marine Fisheries Service
 - Kim Kratz, NMFS/WCR/WCRO/AOD (503) 231-2155
- NOAA Communications/ Public Affairs
 - @NOS - Ben Sherman (lead), Keeley Belva, (back-up), 301-713-3066
 - @NMFS – Katherine Cheney, 503-231-6730
- NOAA Office of Legislative and Intergovernmental Affairs
 - Michael Dukes (202) 482-5597 (NOS portfolio)
 - Linda Belton (202)-482-5447 (Intergovernmental)
 - Christina Durham (202) 482-5935 (NMFS portfolio)
- NOAA PCO (NOS) – Adria Schneck-Scott (202) 482-1281
- NOAA General Counsel
 - Jeff Dillen, (301) 713-7382

EPA Rollout team

- OWOW
 - Don Waye, EPA/OWOW (202) 566-1170
 - Jayne Carlin (tentative), EPA R10/OWW (206) 553-8512
- EPA Communications/ Public Affairs
 - Marianne Holsman 206.553.1237 (EPA NW)
- EPA Office of Legislative and Intergovernmental Affairs
 - Sven-Erik Kaiser, Kaiser.Sven-Erik@epa.gov--202-566-2753
 - Greg Spraul, Spraul.Greg@epa.gov--202-564-0255

Prepared by: ACastellan (OCRM)

Reviewed by: LCWilliams (PPAD), KKKratz (NMFS), MDukes (OLIA), BSherman (PA), EPA staff

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NOAA Spokespeople:

- Joelle Gore, Acting Division Chief, Coastal Programs Division, NOS/OCRM
- Margaret Davidson, Acting Director, Office of Ocean and Coastal Resource Management, NOS
- Will Stelle, Regional Administrator, NMFS Northwest Region

EPA Spokespeople:

- Lynda Hall, Chief, Nonpoint Source Control Branch, EPA HQ
- Christine Psyk, Associate Director, Office of Water and Watersheds, EPA R10
- Dennis McLerran, Regional Administrator, EPA R10

Key Messages:

- Preventing and reducing coastal nonpoint source pollution, as the Coastal Nonpoint Program is designed to do, is very important to NOAA and EPA. Nonpoint source pollution is the most significant remaining water quality issue in Oregon.
- NOAA and EPA have jointly issued a Federal Register Notice seeking public comment on our intent to disapprove Oregon's Coastal Nonpoint Program. We plan to issue a final decision in May 2014.
- If we ultimately disapprove Oregon's Coastal Nonpoint Program NOAA will have to withhold a portion of funding it awards the state under Section 306 of the Coastal Zone Management Act and EPA will have to withhold a portion of the funding it awards under Section 319 of the Clean Water Act. The total amount of withheld funds could range from \$900,000 to approximately \$1.2 million, depending on appropriations levels and other factors.
- We will carefully consider all public comments received during the 90-day public comment period and any additional information submitted by the state when making our final decision about the approvability of its program.

Additional Messages:

- Coastal states that participate in the National Coastal Zone Management Program are required under the Coastal Zone Management Act to develop a Coastal Nonpoint Pollution Control Program (or Coastal Nonpoint Program) that describes the programs and enforceable mechanisms they will use to implement a suite of management measures to prevent and control polluted runoff in coastal waters. The management measures to prevent and control pollution that states are expected to adopt are described in EPA and NOAA guidance.

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- Oregon has developed a strong Coastal Nonpoint Program in the majority of the areas required. The three remaining measures that need to be addressed are important for protecting water quality to support salmon and other cold water aquatic species.
- NOAA and EPA recognize the complexities and political challenges Oregon faces in developing a fully approvable Coastal Nonpoint Program. We have worked closely with the state to try to help it address the conditions on its program and are committed to work as partners with the state to help it meet its challenges. While the state made great progress in addressing many deficiencies, some critical gaps related to water quality impacts from forestry, septic systems, and new development, still remain.
- The improvements needed in the program are additional management measures for forestry, including measures for protecting small and medium sized fish bearing streams and non-fish bearing streams, measures to protect landslide prone areas, and measures to address runoff from legacy forest roads built prior to modern construction and drainage requirements. Additionally, Oregon needs to ensure that septic systems are inspected and properly maintained and that sediment runoff from new development does not enter rivers and streams.
- We also have concerns about nonpoint source impacts from agricultural activities and are inviting comments from the public on the state's agricultural program.
- Oregon is a leader in coastal management and we hope it can be a leader in protecting coastal water quality from nonpoint source pollution, too.
- NOAA and EPA are committed to continuing to work with Oregon to develop a fully approvable Coastal Nonpoint Program, even if it occurs after the settlement agreement's final action.

Plan Summary and Schedule:

- Internal NOAA briefings (NOS AA/DAA briefed, ASCM briefed) - complete
- Pre-coordination on FRN between EPA and NOAA/OCRM (on-going)
- *Two weeks prior to publication of the Notice of Intent* - NOAA-EPA send a note to the Administration in their Cabinet reports to alert them of this precedent setting decision (for NOAA this is the White House and Secretary's Weekly Report).
- *November 27:* NOAA OLIA contacted relevant Oregon offices and committees to offer a briefing (Dukes)
- *December 12:* EPA/NOAA Rollout Coordination Call
- *December 13:* NOAA submits Notice of Intent to Federal Register for publication on Dec. 20 (Nikki Ndubisi, NOS)
- *Target Dec. 17/18:* EPA provide draft of press release to OR
- *December 17:* Call or briefing with interested Congressional staff (Dukes lead, involves rollout spokespeople and others).
- *Target Dec. 19:* OLIA notifies relevant Committee staff and staff in appropriate Member offices that the FRN and press release will be available publicly (Dukes).
- *Target Dec. 20:* Notice of Intent is published in Federal Register.

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- *Target Dec. 20:* NOAA posts notification on OCRM website (Castellan) and issues press release (Sherman).
- *Target Dec. 20:* NOAA sends letters to Tribes notifying them of public comment and asking how they would like to be consulted (Castellan).
- *Target Dec. 20:* NOAA/EPA notify Oregon that FRN is available for public comment (Carlin/Castellan).
- *Target Dec. 20:* GCOC notifies DOJ that FRN is posted; DOJ notifies plaintiff (Dillen).
- *May 2014:* Announcement of NOAA and EPA's final decision on Oregon's Coastal Nonpoint Program (separate rollout prepared at that time).

Materials:

- General talking points (above)
- Call List for NOAA and EPA (email maintained)
- Press release (currently in clearance, NOAA Public Affairs coordinating with EPA)
- Draft final decision document for web will be posted on http://coastalmanagement.noaa.gov/nonpoint/pro_approve.html#Oregon.
- Docket of documents NOAA and EPA used in making decision (to be posted on OCRM's website with proposed decision)
- A message will be posted on the NOAA Ocean and Coastal Resource Management (OCRM) website under "Top News" (<http://coastalmanagement.noaa.gov/welcome.html>) with a link to the press release.
- Federal Register Notice

Background on Coastal Nonpoint Program:

In 1990, Congress established the Coastal Nonpoint Pollution Control Program (Coastal Nonpoint Program) under Section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA) to encourage better coordination between state coastal zone managers and water quality experts to reduce polluted runoff in the coastal zone. Poor water quality is a result of what we do to the water, as well as what we do on the land. Therefore, shared responsibilities are needed for managing coastal water quality between state coastal zone management agencies (which make land use decisions) and water quality agencies which deal directly with the quality of our coastal waters). All coastal and Great Lakes states and territories that participate in the National Coastal Zone Management Program under the Coastal Zone Management Act are required to develop coastal nonpoint programs.

NOAA and EPA jointly administer the Coastal Nonpoint Program. The program establishes a set of management measures for states to use in controlling polluted runoff from six main sources: forestry, agriculture, urban areas, marinas, hydromodification, and wetlands and riparian areas. These measures must be backed by enforceable state policies and mechanisms to ensure their implementation.

Background on Decision on Oregon's Coastal Nonpoint Program:

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Per a settlement agreement with the Northwest Environmental Advocates from a 2009 lawsuit, NOAA and EPA must announce in the Federal Register by November 15, 2013, (renegotiated with the plaintiff to December 13, 2013, as a result of the 16-day government shutdown in October 2013), our intent to fully approve or disapprove Oregon's Coastal Nonpoint Program. NOAA and EPA conditionally approved Oregon's program in 1998 and worked closely with the state to address nearly all of its 40 original conditions. Due to numerous challenges, the state has not yet been able to satisfactorily address several remaining conditions related to impacts from 1) forestry, 2) new development, and 3) septic systems. Therefore, we are announcing our intent to disapprove Oregon's program and are requesting comments from the public for a period of 90 days.

NOAA and EPA will consider all public comments received during this public comment period and any additional information submitted by the state when making our final decision about the approvability of the state's program by May 15, 2014, (as required by the settlement agreement). Significant new information may change our proposed decision or warrant NOAA and EPA to request an extension to the May 15, 2014, settlement deadline to provide the state more time to address its remaining conditions and/or the federal agencies more time to sufficiently consider and respond to all comments received (if extensive). NOAA OCRM is coordinating closely with NOAA General Counsel (GC) and NMFS Northwest Region (given salmon issues) on this decision.

NOAA and EPA's proposed decision to disapprove Oregon's Coastal Nonpoint Program is precedent setting. A disapproval decision may have significant ramifications for 10 other states with conditionally approved Coastal Nonpoint Programs (Alabama, Georgia, Hawaii, Indiana, Louisiana, Michigan, Mississippi, Ohio, Texas, and Washington) as well as the National Coastal Zone Management Program.

If NOAA and EPA disapprove a state's coastal nonpoint program, CZARA requires NOAA to withhold a portion of funding it awards the state under Section 306 of the Coastal Zone Management Act. CZARA also requires EPA to withhold a portion of the funding it awards under Section 319 of the Clean Water Act. The total amount of withheld funds could range from \$900,000 to approximately \$1.2 million, depending on appropriations levels and other factors.

Questions and Answers (supplement to Key Messages):

QUESTION: Under what authority is NOAA and EPA undertaking this action?

ANSWER: Congress created the Coastal Nonpoint Pollution Control Program under Section 6217 of the Coastal Zone Act Reauthorization Amendments. Section 6217 authorizes NOAA and EPA to approve and disapprove a state's coastal nonpoint program.

QUESTION: What is driving the timing of this decision?

ANSWER: The Northwest Environmental Advocates (NWEA) sued NOAA and EPA in 2009 challenging the agencies' joint administration of Oregon's coastal nonpoint program. The

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plaintiff's primary argument was that NOAA and EPA failed to take a final action on the approval (without conditions) or disapproval of Oregon's coastal nonpoint program, as well as to withhold funds from Oregon for not having a fully approved program. NOAA and EPA settled the lawsuit in 2010 and agreed to announce in the Federal Register, our intent to fully approve or disapprove Oregon's program by November 15, 2013, and to make a final decision on the approvability of the program by May 15, 2014.

QUESTION: If the Settlement Agreement requires NOAA and EPA to announce in the Federal Register their intent to approve or disapprove Oregon's program by November 15, 2013, why are the agencies just now announcing their intent to disapprove Oregon's program?

ANSWER: The 16 day shutdown of the Federal Government in October stopped work on the final preparation and clearance of this decision. The plaintiff granted NOAA and EPA additional time to announce our decision given this unforeseen circumstance.

QUESTION: What are the next steps following the publication of the Notice of Intent?

ANSWER: The next steps are as follows:

1. Public submits comments on our proposed decision during the 90-day public comment period.
2. NOAA and EPA will continue to work with the state to address remaining program gaps.
3. NOAA and EPA will carefully consider all comments received and any additional information the state provides in support of its program and make adjustments, as appropriate, to the decision document. We will also develop a "Response to Comments" document.
4. NOAA and EPA intend to make a final decision regarding the disapproval of Oregon's program by May 15, 2014. We will send a letter to the state notifying them of our decision and post our decision and "Response to Comments" online at: http://coastalmanagement.noaa.gov/nonpoint/pro_approve.html#Oregon.

QUESTION: What are the consequences if NOAA and EPA officially disapprove Oregon's Coastal Nonpoint Program?

ANSWER: If NOAA and EPA disapprove a state's coastal nonpoint program, CZARA requires NOAA to withhold a portion of the state's Coastal Zone Management Act Section 306 funding that supports implementation of the state's coastal management program. CZARA also requires EPA to withhold a portion of the state's Clean Water Act Section 319 funding that supports implementation of the state's nonpoint source management program. [*Only if asked about specific funding amounts to be withheld:* The total amount of withheld funds could range from \$900,000 to approximately \$1.2 million, depending on appropriations levels and other factors.]

QUESTION: How can NOAA and EPA expect Oregon to be able to develop a fully approvable Coastal Nonpoint Program when they plan to withhold funding for two important state programs that work to protect and restore water quality and salmon habitat?

ANSWER: We recognize the financial penalties could make it more difficult for Oregon to maintain the same level of effort on key programs that help improve water quality and protect

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salmon habitat, such as the state's coastal management, TMDL, and nonpoint source programs. However, the penalty provision in CZARA was designed to provide a financial disincentive to states to encourage them to develop fully approvable coastal nonpoint programs to provide better protection for coastal water quality. NOAA and EPA will continue to help Oregon direct some of its remaining federal CWA Section 319 and CZMA Section 306 funding, and other federal funding sources, as appropriate, to develop a fully approvable coastal nonpoint program so that the funding reductions from the penalties can be eliminated as soon as possible.

QUESTION: What benchmarks does Oregon need to meet to receive full approval for its Coastal Nonpoint Program?

ANSWER: To receive full approval, CZARA states that each coastal nonpoint program must "provide for the implementation, at a minimum, of management measures in conformity with the guidance published under section (g)...." (6217(b)) and meet other requirements in the Coastal Nonpoint Program guidance (see www.epa.gov/nps/czara for EPA's 6217(g) technical guidance and for NOAA and EPA's programmatic guidance: <http://coastalmanagement.noaa.gov/nonpoint/docs/6217progguidance.pdf>).

QUESTION: What does Oregon need to do to obtain approval from NOAA and EPA?

ANSWER: Oregon needs to adopt additional management measures for forestry to protect small and medium fish bearing streams and non-fish bearing streams, add protections for landslide prone areas, and ensure that legacy forest roads are not a continuing source of sediment that ends up in rivers and streams. Additionally, Oregon needs to finish its program to ensure that septic systems are properly inspected and maintained and that sediment runoff from new development is properly controlled. These remaining areas need to be addressed before NOAA and EPA can approve Oregon's program.

QUESTION: Have EPA and NOAA ever disapproved a state's Coastal Nonpoint Program?

ANSWER: No, EPA and NOAA have not disapproved a state's Coastal Nonpoint Program before. The agencies prefer to work with states to build programs that are approvable. However, NOAA and EPA were sued for failing to issue a final approval or disapproval decision for Oregon's program. The Settlement Agreement for that lawsuit requires EPA and NOAA to propose a decision on the state program's approvability by November 15, 2013. As a result, the agencies must act and do not have the flexibility they might have without court-required deadlines.

QUESTION: Is Oregon being held to a higher bar than other states for Coastal Nonpoint Program approval?

ANSWER: No, Oregon is not being held to a higher bar for approval. The guidance that is used to evaluate and make judgments about Oregon's program is the same that is used to evaluate every other states' program. However, Oregon is the only state where NOAA and EPA have been sued over the agencies' ability to conditionally approve a state's Coastal Nonpoint Program. That lawsuit was settled and EPA and NOAA entered into a settlement agreement

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with the plaintiff. The settlement agreement requires EPA and NOAA to propose in the federal register our intent to approve or disapprove Oregon's program by November 15, 2013, and take a final action on approval or disapproval by May 15, 2014. If there was no Settlement Agreement, the agencies would not be compelled to make a determination by a specific date.

QUESTION: Why are NOAA and EPA not proposing a specific decision on the Agriculture condition like they are for the other three conditions in the decision document but are only seeking public comment on whether or not the state has satisfied the Agriculture condition?

ANSWER: Oregon's coastal nonpoint program is disapproved if the state fails to meet even one of the remaining conditions on its program. Whether or not the state still needs to fully satisfy one, three, or more conditions, does not affect NOAA and EPA's proposed disapproval decision. NOAA and EPA gave Oregon interim (tentative) approval of its agriculture conditions in 2004 because, based on the information we had at the time, we believed the state had met the conditions placed on its program for the agriculture management measures. However, we seek to improve our understanding about the mechanisms of the state's agricultural program for addressing water quality impacts from agriculture within the coastal nonpoint management area and are therefore seeking public comment before making a final decision on the approvability of this condition.

QUESTION: What are the specific concerns you are hearing related to agriculture?

ANSWER: Although the federal agencies initially found that the State's agriculture programs enabled the it to satisfy the agriculture condition on its coastal nonpoint program, there is concern that water quality impairments from agriculture activities within the coastal nonpoint management area are widespread and that the State's programs and policies may not adequately meet the 6217(g) management measures for agriculture to protect coastal waters. For example, NOAA's National Marine Fisheries Services' recent listings for coho salmon and draft recovery plans (both under the Endangered Species Act) find that insufficient riparian buffers around agriculture activities are one of the contributors to the salmon's decline.

Some specific concerns with the State's agriculture program that have been brought to the federal agencies' attention and may influence the final decision of whether or not the State has satisfied the 6217(g) agriculture management measure requirements and the conditions placed on its program include the following:

- Enforcement is limited and largely complaint-driven; it is unclear what enforcement actions have been taken in the coastal nonpoint management area and what improvements resulted from those actions.
- The AWQMA plan rules are general and do not include specific requirements for implementing the plan recommendations, such as specific buffer requirements to adequately protect water quality and fish habitat.
- AWQMA planning has focused primarily on impaired areas when the focus should be on both protection and restoration.
- The State does not administer a formalized process to track implementation and effectiveness of AWQMA plans.

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- AWQMA planning and enforcement does not address “legacy” issues created by agriculture activities that are no longer occurring.

Question: How effective do you think the Coastal Nonpoint Program is?

Answer: That’s a very good question and would be a great topic for a separate briefing. However, today’s purpose is to talk about NOAA and EPA’s proposed decision regarding Oregon’s program and is not the right time to get into a broader philosophical discussion on the effectiveness of the Coastal Nonpoint Program.

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